Tang Kong Meng v Zainon bte Md Zain & Anor

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 24-1027-93 CONSOLIDATED WITH ORIGINATING SUMMONS NO 24-463-94
JAMES FOONG J
15 JUNE 1995

Family Law *— Children — Adoption — Illegitimate child — Consent of natural mother obtained — Whether consent of natural father can be dispensed with — Requirements of valid adoption — Registration of Adoptions Act 1952 s 6(1)*

Family Law *— Children — Custodianship — Infant — Paramount consideration — Welfare of the child — Factors taken into account — Courts of Judicature Act 1964 s 24(d)*

Family Law *— Children — Minor's religion — Minor given up for adoption — Adoption null and void — Who to decide on minor's religion — Federal Constitution art 12(4)*

The plaintiff was the natural father of an illegitimate child named Alvina Tang Mei Kwan ('Alvina') born to one Chong Mo Mooi ('Mdm Chong') on 3 December 1986. Mdm Chong gave up Alvina for adoption to the defendants who had been Alvina's baby sitters since she was three months old. The application for adoption was processed with Mdm Chong's letter of consent but without the plaintiff's knowledge or consent. However, the Registrar of Adoptions exercised her discretion to dispense with the consent of any parent as provided under the Registration of Adoptions Act 1952 and registered Alvina's adoption on 11 May 1991. On the same day, she was converted to the Islamic faith and renamed Noralvina bte Abdullah. The plaintiff applied for declarations that: (i) he was lawfully entitled to the custody and care of Alvina; (ii) the receipt by Alvina of religious instructions or her participation in any ceremony or act of worship of the Islamic faith was in contrary to art 12(4) of the Federal Constitution; and (iii) the defendants do deliver Alvina to him. The plaintiff argued that as Mdm Chong had left the plaintiff, he had assumed the role of guardian, and as the requirement of custody and maintainance of Alvina by the defendants under s 6 of the Registration of Adoptions 1952 ('the Act') was not fulfilled, the adoption was invalid. On the other hand, the first defendant sought, inter alia, a declaration that the registration of the adoption of Alvina was lawful and the right to custody of Alvina be granted to him on the grounds, inter alia, that as Alvina was an illegitimate child, Mdm Chong, as Alvina's natural mother, had exclusive care and custody of her and could give a valid consent to the adoption.

Held, allowing the plaintiff's application and dismissing the defendants' application but granting custody to the defendants:

(1) As Alvina was an illegitimate child, her natural mother, Mdm Chong, had the obligation to maintain her and had exclusive

A care of her. On the evidence, it could not be said that Mdm Chong had abandoned her rights since she had continued to visit Alvina and pay for her maintanence before adoption. Therefore, she could give her consent to the registration of Alvina's adoption.

(2) However, there are other requirements for adoption under s 6 of
B the Act, in particular, the requirements that the prospective parents must have had continuous custody of and maintained the child for a period of two years before the application for adoption.

(3) As the meaning of 'custody' is not defined in the Act or in any
C other relevant Malaysian law, the court deduced it to mean physical custody in this case. The defendants had physical custody of Alvina for more than two years before the application for adoption, and as such, they had 'custody' over her as required by s 6(1) of the Act. However, Alvina's maintanence was paid by Mdm Chong and the plaintiff throughout the period. Since the
D requirements under s 6(1) are conjunctive, failure to satisfy any one condition resulted in the registration of the adoption of Alvina being void ab initio.

(4) In considering the question of custody, the welfare of the child is of paramount importance. Since the defendants wanted Alvina
E for their child and had taken care of her practically since birth, they were appointed as the court's appointed guardians pursuant to s 24(d) of the Courts of Judicature Act 1964. However, they did not have the right to decide on her religion as she was under 18 years of age and Alvina was not to take part in any act of worship of the Islamic faith. The plaintiff and Mdm Chong were
F granted access to her once a month.

[Bahasa Malaysia summary

Plaintif merupakan bapa sebenar seorang anak tak sah taraf bernama Alvina Tang Mei Kwan ('Alvina') yang dilahirkan kepada seorang
G yang bernama Chong Mo Mooi ('Pn Chong') pada 3 Disember 1986. Pn Chong telah memberikan anaknya untuk dijadikan anak angkat defendan yang merupakan penjaganya sejak beliau berumur tiga bulan. Permohonan pengangkatan telah diproses dengan surat keizinan Pn Chong tetapi tanpa keizinan atau pengetahuan plaintif.
H Walau bagaimanapun, Pendaftar Pengangkatan telah menggunakan budi bicaranya untuk mengenepikan kebenaran mana-mana ibu bapa seperti yang diperuntukkan di dalam Akta Pendaftaran Pengangkatan 1952 dan telah mendaftarkan pengangkatan Alvina pada 11 Mei 1991. Pada hari yang sama, beliau telah memeluk agama Islam dan
I dinamakan Noralvina bte Abdullah. Plaintif telah memohon untuk deklarasi bahawa: (i) beliau berhak menjaga dan memelihara Alvina; (ii) penerimaan ajaran ugama Islam atau penyertaan Alvina di dalam apa-apa acara atau sembahyang mengikut ajaran Islam adalah menyalahi perkara 12(4) Perlembagaan Persekutuan; dan (iii) defendan hendaklah menyerahkan Alvina kepadanya. Plaintif berhujah bahawa oleh kerana Pn Chong telah meninggalkan plaintif,

beliau telah mengambil alih peranan penjaga, dan oleh kerana keperluan jagaan dan penyaraan Alvina oleh defendan di bawah s 6 Akta Pendaftaran Pengangkatan 1952 ('Akta itu') tidak dipenuhi, pengangkatan itu tidak sah. Sebaliknya, defendan pertama memohon, antara lainnya, suatu deklarasi bahawa pendaftaran pengangkatan Alvina adalah sah dan supaya hak menjaga Alvina diberikan kepadanya atas alasan, antara lain, bahawa oleh kerana Alvina adalah seorang anak tak sah taraf, Pn Chong, sebagai ibunya sebenar mempunyai pemeliharaan dan jagaannya yang eksklusif dan boleh memberi kebenaran yang sah untuk pengangkatan itu.

Diputuskan, membenarkan permohonan plaintif dan mengenepikan permohonan defendan tetapi memberi hak penjagaan kepada defendan:

(1) Oleh kerana Alvina adalah seorang anak tak sah taraf, ibunya yang sebenar, Pn Chong, mempunyai tanggungjawab untuk menyaranya dan mempunyai hak eksklusif untuk memeliharanya. Mengikut keterangan, tidak boleh dikatakan bahawa Pn Chong telah menyerahkan haknya kerana beliau terus mengunjungi Alvina dan membayar untuk penyaraannya sebelum pengangkatan. Oleh yang demikian, beliau boleh memberikan keizinannya untuk pendaftaran pengangkatan Alvina.

(2) Walau bagaimanapun, terdapat keperluan lain untuk pengangkatan di bawah s 6(1) Akta itu, terutamanya keperluan bahawa bakal ibu bapa itu mestilah mempunyai jagaan yang berterusan dan menyara anak itu bagi tempoh dua tahun sebelum permohonan untuk pengangkatan dibuat.

(3) Oleh kerana perkataan 'jagaan' tidak ditakrifkan di dalam Akta itu atau di dalam mana-mana undang-undang Malaysia lain yang releven, mahkamah membuat kesimpulan bahawa ia bermaksud jagaan fizikal di dalam kes ini. Defendan mempunyai jagaan fizikal Alvina untuk lebih daripada dua tahun sebelum permohonan untuk pengangkatan itu, dan dengan demikian, mereka mempunyai 'jagaan' Alvina seperti yang diperlukan oleh s 6(1) Akta itu. Tetapi, penyaraan Alvina telah dibayar oleh Pn Chong dan plaintif sepanjang tempoh itu. Oleh kerana keperluan di bawah s 6(1) adalah bersifat penghubung, kegagalan untuk memenuhi mana-mana satu syarat mengakibatkan pendaftaran pengangkatan Alvina menjadi tak sah ab initio.

(4) Dalam mempertimbangkan soalan mengenai jagaan, kebajikan anak itu adalah kepentingan utama. Oleh kerana defendan mahu menjadikan Alvina anak mereka dan boleh dikatakan telah menjaganya dari masa beliau dilahirkan, mereka telah dilantik sebagai penjaga Alvina yang dilantik oleh mahkamah di bawah s 24(d) Akta Mahkamah Kehakiman 1964. Bagaimanapun, mereka tidak mempunyai hak untuk membuat keputusan tentang agamanya kerana beliau berumur di bawah 18 tahun dan Alvina tidak dibenarkan mengambil bahagian dalam sebarang adat

A sembahyang mengikut ajaran agama Islam. Plaintif dan Pn Chong dibenarkan akses kepada beliau sebulan sekali.]

[*Editorial Note*: The plaintiff has appealed to the Court of Appeal.]

B **Notes**

For cases on children, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1754–1857.

Cases referred to

C *Horner v Horner* (1799) 1 Hag Con 377 (refd)
R v Brighton (Inhabitants) (1861) 1 B & S 447 (refd)
T v O [1993] 1 MLJ 168 (refd)
Tam Ley Chian v Seah Heng Lye [1993] 3 MLJ 696 (refd)

Legislation referred to

D Federal Constitution art 12(4)
Adoption Act 1952
Civil Law Act 1956 s 27
Courts of Judicature Act 1964 s 24
Registration of Adoptions Act 1952 s 6(1)

E *Karpal Singh* (*Karpal Singh & Co*) for the plaintiff.
Mohamad Ibrahim (*Mohamad Ibrahim & Co*) for the defendants.

James Foong J: These two cases were consolidated for trial as the subject matters involved are similar. In originating summons No 24–1027–93, the F plaintiff, Tang Kong Meng @ Tan Mang ('Tang'), is seeking inter alia:

(1) a declaration that he is lawfully entitled to the custody and care of his daughter Alvina Tang Mei Kwan ('Alvina');

(2) a declaration that Alvina in receiving religious instructions in or in taking part in any ceremony or act of worship of the Islamic faith is G in contravention of art 12(4) of the Federal Constitution; and

(3) that the first defendant, Zainon bte Md Zain ('Zainon'), and the second defendant, Suhaimi bin Shamsudin ('Suhaimi'), do deliver to Tang, Alvina.

H On the other hand, in originating summons No 24–463–94, Suhaimi is seeking a declaration that the registration of the adoption of Alvina under the Registration of Adoptions Act 1952 ('the Act') is lawful, and the right to custody of Alvina be granted to Suhaimi. In this originating summons, the defendant named is Tang.

I Besides affidavits filed by the relevant parties in both these cases, viva voce evidence was also adduced from the respective parties including their witnesses. This, as agreed by all parties would enable this court to be in a better position to evaluate the evidence which is so necessary in a case of this nature, where human feelings of the parties in particular, and the racial and religious sensitivities of the two major races in our country in

general are involved; not forgetting the paramount importance of the welfare of a young girl, Alvina. A

In brief, the facts of this case are as follows. On 3 December 1986, Alvina, a female, was born to one Chong Mo Mooi ('Mdm Chong') and Tang. They were not married at that material time as Tang was then still married to another lady. When Alvina was only three months old, according to Mdm Chong, she handed her to Zainon and Suhaimi to be looked after in a manner as a baby sitter at a charge of RM180 per month. Tang on the other hand asserted that it was Mdm Chong together with him who found Zainon and Suhaimi to be the baby sitter. After careful consideration of the evidence, this court is more inclined to believe the latter's version. Soon after this took place, Tang and Mdm Chong parted ways, but nevertheless each visited Alvina from time to time, and according to Mdm Chong she continued to pay Suhaimi and Zainon the charges for baby sitting Alvina. B C

In 1990, Tang went to Singapore to work. According to both Suhaimi and Zainon, Tang did return to visit Alvina in 1991 and on one occasion stayed in Suhaimi and Zainon's house for two to three nights sleeping with his daughter, Alvina. D

Towards the end of 1990, Mdm Chong who had also been visiting Alvina on and off agreed to allow Suhaimi and Zainon to adopt Alvina, and to convert her to the Islamic faith. With this, both Suhaimi and Zainon made an application to the Registrar of Adoptions ('Registrar') at Daerah Gombak, Selangor, under the Act to adopt Alvina on 8 December 1990. This application was processed together with a letter of consent to the adoption signed by Mdm Chong. However, in the application form, though Tang's name was inserted, his particulars such as race, religion, place of birth and more importantly, his address was left blank. According to DW4, the registrar, she could only interview Suhaimi and Zainon and Mdm Chong, leaving out Tang since his whereabouts were unknown and not disclosed. As the necessary ingredients for the adoption under the Act had been fulfilled, and by exercising her discretion as provided under the said Act to dispense with the consent of any parent, she registered the adoption of Alvina in the register of adoption on 11 May 1991. Practically on the same day, Alvina was converted to the Islamic faith and was given the name of Noralvina bte Abdullah. E F G

In November 1991, according to Suhaimi, Tang did come to visit Alvina. The adoption and conversion of Alvina to Islam was concealed from Tang. Then came June 1992 when Tang took Alvina away from Suhaimi and Zainon to reside in his sister's house in Menglembu, Perak. By October 1992, Alvina was enrolled into a Chinese school. Almost around this time, Tang came to understand from his brother in Kuala Lumpur that the police were looking for him for the alleged kidnapping of Alvina. Upon this, he immediately surrendered himself and Alvina to the authorities. Since then, Alvina was returned to Suhaimi and Zainon and the series of these cases began. Alvina is now nine years of age. H I

Encik Ibrahim, counsel for Suhaimi and Zainon urged this court to uphold the adoption as not only all the necessary ingredients under s 6 of

A the Act have been fulfilled but, since Alvina was an illegitimate child, Mdm Chong being the natural mother had the exclusive care and custody over her, which includes consent to the adoption. As Alvina was legally adopted, Suhaimi and Zainon who consequently became her parents could give the necessary consent for Alvina to be converted into the Islamic faith.

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Encik Karpal Singh, counsel for Tang, however argued that from the evidence of Tang, Mdm Chong left him and Alvina when Alvina was three months old. By this desertion, Mdm Chong had abandoned her legal right and since then, Tang had assumed the role of a guardian to Alvina. By this, Mdm Chong had no authority and right to grant consent for the

C adoption; any such right lay solely with Tang, and he had not exercised it. Further, Encik Karpal Singh claimed that not all relevant factors as required under s 6 of the Act had been fulfilled at the time of Alvina's adoption. Suhaimi and Zainon did not have custody of Alvina nor did they maintain her at the material time of adoption. Based on the testimony of Tang, he

D had since 1986 maintained Alvina by paying Suhaimi and Zainon their charges, and some of these payments are evidenced by vouchers and bankers' receipts of payments to Zainon. As there was non-compliance of two of the ingredients set out in s 6 of the Act, the registration of this adoption was invalid, thus extinguishing Suhaimi's and Zainon's consent to have Alvina converted to Islam. Consequently, Alvina should be returned

E to Tang for custody.

There was never a dispute in this case that Alvina is an illegitimate child of Mdm Chong and Tang. Being an illegitimate child, even Encik Karpal Singh has candidly admitted that the putative father has no legal right over the child under civil law, and the natural mother has the

F obligation not only to maintain the child, but is also entitled to exclusive care. (See the cases of *R v Brighton (Inhabitants)* (1861) 1 B & S 447 and *Horner v Horner* (1799) 1 Hag Con 377 which were accepted in our Malaysian courts in *T v O* [1993] 1 MLJ 168 and *Tam Ley Chian v Seah Heng Lye* [1993] 3 MLJ 696.) This must be the state of law for s 27 of the Civil Law Act 1956 provides that:

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> In all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Act, regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by any written law.

H When Mdm Chong had the exclusive care over Alvina, the next issue is whether she did abandon such rights as alleged by Tang, and the same was picked up by Tang to be Alvina's guardian. After viewing the evidence as a whole, this court finds that Mdm Chong did not abandon such rights. Though she was separated from Tang, she continued to visit Alvina

I throughout, and even gave Suhaimi and Zainon money for Alvina's maintenance right up to the time of the adoption. Having such right, she can give her consent to the registration of Alvina's adoption.

Consent for adoption under the Act is only one of the many factors to qualify to complete the adoption process under this Act; there are also

other qualifications. In order to examine these, it is best to reproduce s 6(1) of the Act:

> Where at the date when application for registration is made any child under the age of eighteen years who has never been married is in the custody of, and is being brought up, maintained and educated by any person, or by two spouses jointly, as his, her or their own child under any de facto adoption, and has for a period of not less than two years continuously and immediately before the date of such application been in such custody and has been so brought up, maintained and educated, the Registrar may, upon the application, in the form in the First Schedule, of such person or spouses, register the adoption if —
>
> (a) such person or spouses and the child shall appear before the Registrar and shall produce to the Registrar such evidence either oral or documentary as may satisfy the Registrar that such adoption took place;
>
> (b) the parents or one of the parents, or, if both the parents are dead or if neither of the parents is within West Malaysia, any guardian of the child shall appear before the Registrar and express consent to the adoption:
>
> Provided that if the Registrar is satisfied that in all the circumstances of the case it is just and equitable and for the welfare of the child he may dispense with the consent of any parent or custodian of the child or with the appearance of any parent or custodian who shall have signified his consent by statutory declaration; and
>
> (c) the prescribed fees are paid.

Here, two requirements are singled out for scrutiny by this court in the light of the circumstances of this case. The first, is the 'custody' factor. Did Suhaimi and Zainon have custody over Alvina for a continuous period of two years before the registration of the adoption? By custody one could have argued that it was legally with Mdm Chong; Suhaimi and Zainon had only the physical custody. Mdm Chong's legal custody was derived from the fact that she is the natural mother of an illegitimate child. With the meaning of custody in a state of uncertainty (see 5(2) *Halsbury's Laws of England* para 729 at p 413), as being used in various contexts to connote different purposes, and the Act or other relevant Malaysian enactments giving no definition to its meaning, this court can only deduce it to mean physical custody in this case. The whole objective for the enactment of the Act seems to be to cater for de facto adoption. The word 'de facto' according to the English *Oxford Dictionary* is defined as 'in fact; whether by right or not; as if'. By this, a person seeking adoption naturally must have physical custody of the child for a period of not less than two years. If he is seeking adoption of the child when legal custody is already in his possession, than the procedure to follow should be under the Adoption Act of 1952, where a more elaborate process is required culminating in a final sanction by a court of law. From the facts of this case, there can be no doubt that Suhaimi and Zainon had physical custody of Alvina for more than two years before the application for adoption, and as such, this court is of the view that they had 'custody' over the said child at the material time as is required by s 6(1) of the Act.

A The second factor is whether Alvina was 'maintained' by Suhaimi and Zainon before the adoption as is required under s 6 of the Act. Though both Suhaimi and Zainon denied receiving any maintenance from Mdm Chong and Tang after the first three months when Alvina was handed to them, it cannot override the explicit testimony of Mdm Chong B who stated that she paid for Alvina's maintenance right up to the time of adoption, and these payments were made to Suhaimi and Zainon. It must be borne in mind that Mdm Chong was called to testify for Suhaimi and Zainon and her evidence, if at all biased, should be for Suhaimi and Zainon, but not to their disadvantage. In addition to this, there are vouchers signed by Zainon acknowledging receipt of money from Tang to C maintain Alvina for a period both before and after the registration of the adoption. Zainon initially attempted to explain that she received no such sums from Tang, but eventually changed her version to that of not knowing what she was signing or that these vouchers were blank. Unfortunately, all these added to more blunders and contradictions as she proceeded in her D attempt to conceal the truth.

With overwhelming oral and documentary evidence, this court cannot, but find both Suhaimi and Zainon were paid monetary consideration by Mdm Chong and Tang throughout the period before registration of the adoption for the maintenance of Alvina. With such payments, Suhaimi E and Zainon could not have been considered to have maintained Alvina as is required under s 6(1) of the Act. Since the requirements under s 6(1) are conjunctive in nature, failure to satisfy any one condition would result in the registration of the adoption of Alvina to be void ab initio. In this case, as this court has found that Suhaimi and Zainon did not maintain Alvina during the entire period of custody they had of her right up to the time of F the registration of the adoption, the registration of Alvina's adoption under the Act is hereby declared null and void. This court accordingly orders that such registration be deleted from the register of adoption. Consequently, this court hereby dismisses Suhaimi's and Zainon's originating summons No 24–463–94 with costs.

G Without this registration of adoption, Suhaimi and Zainon not being Alvina's parents or guardians could not decide on the religion of Alvina as she was at the material time of conversion to Islam still under the age of 18 years. This is provided for under art 12(4) of the Federal Constitution which reads as follows:

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> For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

By this provision, this court hereby allows Tang's prayer in case No 24–1027–93 to declare that Alvina should not receive further religious instructions in or to take part in any ceremony or act of worship of the I Islamic faith.

Now, what is more fundamental is the issue of custody of Alvina. Mdm Chong, though in law has a better right being the natural mother of an illegitimate child, did expressly state that Alvina would have a better life

than her with Suhaimi and Zainon, and for this she consented to their adoption of Alvina. Obviously, she has no interest, intention and the ability to regain physical possesion of Alvina. Coupled with her background, having two other illegitimate children by two different men besides Tang and with her limited financial resources, she is certainly in no position to look after Alvina. As for Tang, he may be in a more stable financial situation, but he works in Singapore and cannot be physically with Alvina or spend sufficient time with her. It is the strong feeling of this court that Alvina having gone through these traumas so early in life would require much tender loving care both of a physical and mental nature. This, in the opinion of this court, Tang is unable to provide, and as evidenced from the period he had physical custody of Alvina in June to October of 1992, he deposited her with his sister in Menglembu, Perak to be looked after and no sooner he was off.

In considering the question of custody, the welfare of the child is of paramount importance. With this fundamental principle in mind, one can only turn to Suhaimi and Zainon who have taken care of Alvina since the age of three months. They have, as no parties to this case have disputed, doted on Alvina to the extent of even refusing to part with her. They wanted her to be one of their own children, and this is understandable for they have looked after her practically since birth. Though some customs and religious practice between Zainon and Suhaimi and that of what Alvina was born into are different, but within a progressive Malaysia where racial harmony and unity have achieved significant progress, such differences can be, and should be overlooked to accommodate the future welfare of Alvina which is of paramount importance. Such being the case, this court with the agreement and consent of Zainon and Suhaimi appoints them as the court's appointed guardians to Alvina. This power to do so is provided for under s 24(d) of the Courts of Judicature Act 1964 which reads as follows:

> jurisdiction to appoint and control guardians of infants and generally over the person and property of infants;

Attached to this appointment, this court hereby also directs that:

(a) both Tang and Mdm Chong, being the natural father and mother of Alvina, respectively, be each granted access to Alvina once a month on a weekend commencing Saturday at 10am and returning her before 7pm on a Sunday, with liberty to apply; and,

(b) that this appointment does not provide Suhaimi and Zainon with the right to decide on the religion of Alvina nor should she take part in any ceremony or act of worship of the Islamic faith until this court orders otherwise.

Application allowed.

Reported by Azra Azman